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In The Supreme Court of the United States

ALPHONSO L. GRANT, in his individual capacity and in his official capacity as a member of the City of Lynchburg Electoral Board and JOHN E. MASON, JR., in his individual capacity, et al.,

Petitioners,

v.

INEZ SALES and DEBRA M. MILLER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fourth Circuit correctly hold that Petitioners waived, abandoned, and forfeited their right to pursue the affirmative defense of qualified immunity after they went through an entire trial and an appeal without pursuing the defense, waiting until the case was remanded for a second trial (more than three years after the initial complaint was filed) and less than one month before the start of that second trial to bring the issue of qualified immunity to the attention of the District Court?

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INTRODUCTION

Respondents Inez Sales and Debra M. Miller ("respondents" or "plaintiffs") hereby submit this brief in opposition to the Petition for Writ of Certiorari ("the Petition") filed by petitioners Alphonso L. Grant ("Grant") and John E. Mason, Jr. ("Mason") (collectively "petitioners" or "defendants") which seeks to overturn the decision below of the United States Court of Appeals for the Fourth Circuit. In *Sales v. Grant*, 224 F.3d 293 (4th Cir. 2000) ("*Sales II*"), the Fourth Circuit held that under the *narrow circumstances* of this case, where the defendants did not pursue a defense of qualified immunity after going through an entire trial and an appeal, they waived the defense and could not pursue it on remand for the first time less than one month before the commencement of a second trial. The Court explained that:

> Under the circumstances, we have no trouble concluding that defendants waived their right to press seriously their claim of qualified immunity for the first time after remand.

Id. at 296. Following the decision in *Sales II*, the defendants filed with the Fourth Circuit a petition for rehearing and rehearing *en banc*, which was denied.

Defendants' claim of qualified immunity has been rejected at every turn because it is futile and has no substantive merit, and because petitioners waived their right to assert the defense by waiting more than three years to do so. Let there be no mistake that the goal of petitioners in pursuing a qualified immunity argument at such a very late stage is plain and simple – to delay this case from getting to the jury. Petitioners knowingly and intentionally discriminated against the plaintiffs because of the plaintiffs'

political affiliations and defendants now wish to avoid a jury verdict. Defendants therefore raised the only argument which would allow them, by filing an interlocutory appeal, to delay a second trial on the merits. The Petition for Writ of Certiorari is petitioners' last attempt at delay and it is unsupportable as a matter of law.

The Fourth Circuit found that the petitioners had waived their right to assert qualified immunity, but the Court was careful to limit its holding to the specific and unusual facts of this case, stating as follows:

> [In finding waiver] we do not hold categorically that a section 1983 defendant must pursue the defense of qualified immunity on every occasion possible in order to preserve his right to raise that defense in later proceedings. Rather, we hold only where, as here, a defendant only cursorily references qualified immunity in his answer . . . and thereafter fails to mention, let alone seriously press, his assertion . . . despite filing several dispositive motions . . . and despite participating in a trial on the merits of the section 1983 claim, that defendant may not actively pursue his claim of qualified immunity for the first time after appeal.

Id. at 296.

There is nothing surprising or unusual about the holding of the Fourth Circuit, which is limited to the particular facts and is supported by well established precedent that the defense of qualified immunity is subject to waiver. The decision is also consistent with those of other

United States Circuit Courts of Appeal which have rejected the precise argument made by defendants in this case, i.e. that the mere reference to qualified immunity in an answer preserves the defense for all time and forever insulates a defendant from a claim of waiver. *See, e.g., Walsh v. Mellas*, 837 F.2d 789, 799-800 (7th Cir. 1988) (holding that a defendant who simply raised the defense in his answer, but failed to pursue the defense at any other time through the first trial had waived the defense and could not assert it on remand or during a second appeal). Plaintiffs are aware of no case, and petitioners have cited none, which has adopted the argument that a cursory reference to the defense of qualified immunity in an answer forever preserves the right of a defendant to assert the defense, regardless of the stage of the proceedings.

The self-evident reasoning behind the Court's decision in *Sales II* is that pursuing a defense of qualified immunity for the first time after a full-blown trial and an appeal, can be the platform for a strategy of delay and is subject to abuse through the right of an interlocutory appeal. Waiver is therefore a crucial shield to fight against such a strategy of delay. The decision of the Fourth Circuit recognizes the necessity of the waiver principle where, as in this case, the defendants had no legitimate excuse for delaying three years before pursuing a claim of qualified immunity.

In the face of the substantial precedent supporting the decision of the Fourth Circuit in *Sales II*, defendants argue their delay in asserting qualified immunity was justified because they somehow could not have raised the defense in advance of the Fourth Circuit's decision in the first appeal, *Sales v. Grant,* 158 F.3d 768 (4th Cir. 1998) ("*Sales I*"). Specifically, defendants argue *Sales I* changed the law of

proximate cause, and therefore gave rise to a qualified immunity defense, because it recognized, for the first time according to defendants, the theory that 42 U.S.C. § 1983 ("Section 1983") "imposes liability not only for conduct that directly violates a right[,] but for conduct that is the effective cause of another's direct infliction of the constitutional injury." *Sales I*, 158 F.3d at 776. Defendants' argument borders on the absurd – this principle of effective causation by indirect means is nothing more than the basic definition of "proximate cause," which is hardly a new concept and known to anyone who has taken a first-year torts class.[1]

In *Sales I*, the Fourth Circuit applied well established law under Section 1983, stating that the "*governing law under which we assess the evidence here is settled and* undisputed," and that the principle of "effective causation" was "grounded in the literal language of § 1983 and in general tort law . . . [and] has been widely recognized in

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[1] Not only is defendants' argument meritless because *Sales I* did not create new law, their whole qualified immunity theory is futile and meritless. Defendants argue that they are entitled to qualified immunity because plaintiffs' theory of *causation* is novel. Plaintiffs are aware of *no case* that allowed qualified immunity to be asserted on the basis of a causation theory. Instead, causation is a question of fact for the jury. The only issue for determining the validity of a qualified immunity defense is whether the *plaintiffs' rights* were clearly established. *See e.g.*, *Triad Associates, Inc. v. Chicago Housing Authority*, 1997 WL 160744 (N.D. Ill. 1997) (rejecting defendants' effort to merge the issues of causation and qualified immunity, stating "[defendant] has not cited, and nor have we discussed, any authority linking the issues of causation and damages to qualified immunity. As plaintiffs indicate, the issues of causation and potential damages are factual questions for the jury ..."). In this case, the law has been clear since the mid-1980s that assistant registrars in Virginia cannot be discriminated against on the basis of their political affiliation. *McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987). Defendants were on notice of the law and knew, as they so testified, that they could not, for political purposes, cause Read (the registrar) to not reappoint plaintiffs as assistant registrars. J.A. 168 176-177.

§ 1983 litigation." *Id.* at 775-76 (numerous citations omitted) (emphasis added). Indeed, the language of Section 1983 itself, which was enacted 130 years ago, expressly incorporates the principle of effective causation. Specifically, Section 1983 imposes liability on a person who, acting under color of state law, "subjects or *causes* to be subjected" another person to a constitutional deprivation. 42 U.S.C. § 1983; *Sales I*, 158 F.3d at 776. Accordingly, the defendants' argument that *Sales I* somehow expanded the law and established a new legal theory of causation is not supportable.

Defendants also have known since the day they were served in 1996 that they, as Electoral Board members of the City of Lynchburg, Virginia, were being accused of causing, by fraud and deception, the newly-appointed Registrar of the City (Carol S. Read) to not reappoint plaintiffs, who were incumbent Assistant Registrars, based on their political affiliations. If plaintiff's theory of causation was truly novel, defendants should have raised and pursued their claim for qualified immunity in a dispositive motion or at trial prior to remand. Plaintiffs should not be further delayed in their effort to obtain justice – *they have been waiting more than five years* to have a jury decide their case and have incurred substantial expense in a trial and on two appeals.

The simple fact is that defendants waived any qualified immunity defense by failing to pursue it before or during the first trial or on appeal in *Sales I*. The holding of the Fourth Circuit in *Sales II* is limited to these facts and is in full accordance with existing law. In other words:

> What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of

> law and did not unquestionably err – precisely the type of case in which we are *most* inclined to deny certiorari.

Kyles v. Whitley, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) (emphasis in original). There is simply no reason or need for this Court to grant a writ of certiorari.

STATEMENT OF THE CASE/PROCEDURAL HISTORY

Respondents submit that petitioners' "Statement of the Case" is little more than a five and a half page diatribe challenging the law applied to this case by the Fourth Circuit in *Sales I*. What is missing is a full description of the numerous times in the proceedings prior to the first trial and the appeal in *Sales I* that petitioners raised dispositive legal challenges to the respondents' case, while, at the same time, failing to raise or press a defense of qualified immunity. A brief summary of the many chances that petitioners' had to raise their qualified immunity defense follows.

Plaintiffs are the former Assistant Registrars for the City of Lynchburg, Virginia. Plaintiffs claim that in March 1995, Grant and Mason, who then comprised a Republican majority of the three-member City of Lynchburg Electoral Board ("the Electoral Board"), violated their constitutional rights by causing them not to be reappointed to their positions because of their political affiliation with the Democratic Party. Plaintiffs claim that Grant and Mason accomplished this by engaging in deceptive and fraudulent acts which allowed them to manipulate and control the decision of the General Registrar, Carol S. Read, who had just been appointed to the position by Grant and Mason.[2] By

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[2] Read had been appointed by Grant and Mason in March 1995 to replace Linda Arnold as General Registrar. In July 1995, a federal jury found

- footnote continued -

falsely telling Read that plaintiffs would sabotage the office if reappointed, and otherwise manipulating Read's decision through such actions as palming off to her a bogus recommendation of the defendants' chosen candidates for Assistant Registrar which appeared to come from the City of Lynchburg Personnel Department, but which actually had been drafted by Grant, defendants caused Read not to reappoint or even consider plaintiffs. This case has already been the subject of an earlier appeal, *see Sales I*, and the facts of the case are set forth in that published decision.

There was abundant evidence that Grant and Mason caused plaintiffs not to be reappointed "by taking advantage of Read's deliberately encouraged dependence on them in a new and unfamiliar and fast-moving situation to convince her that she had but one choice [to appoint Dori Harvey, plaintiffs' eventual replacement, who had been hand-picked by Grant and Mason], a choice bolstered by a bogus official recommendation that they had contrived." *Sales I,* 158 F.3d at 778. In addition, the Court found there was powerful evidence that defendants' conduct was "substantially, *if not entirely*, motivated by political considerations." *Id.* at 780 (emphasis added).

On April 1, 1996, plaintiffs filed suit under Section 1983 against Grant and Mason. J.A. 15.[3] In response to the Complaint Grant and Mason filed a motion to dismiss pursuant to Rule 12(b)(6), contending they could not be liable because Read, and not they, had the sole statutory

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that Grant and Mason had not reappointed Arnold because of her political affiliation with the Democratic Party and awarded her $150,000 in damages. *Sales I*, 158 F.3d at 774.

[3] "J.A. ___" refers to the Joint Appendix filed in the Fourth Circuit in *Sales II*. "S.J.A. ___" refers to the Joint Appendix filed in *Sales I*.

authority under Virginia law to appoint assistant registrars. J.A. 291-297.

In their reply memorandum in support of their motion to dismiss, served on July 19, 1996, Grant and Mason expressly acknowledged their understanding that plaintiffs sought to hold *them* liable for *causing* Read not to reappoint plaintiffs. J.A. 298-305. Grant and Mason denied liability because they did not have the statutory authority to appoint assistant registrars and argued that plaintiffs' theory of "proximate cause" was not "sufficient" to "bring their case within the ambit of Section 1983 . . . ." J.A. 302. Ironically, in support of their positions, defendants cited and attempted to distinguish the very cases cited by the Fourth Circuit in *Sales I* which defendants now say has *never* been the law. These cases, however, demonstrate that the principle of effective causation by indirect means has long been well established under the law of Section 1983, including *Malley v. Briggs*, 477 U.S. 345 (1986) and *Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir. 1984). *Compare Sales I*, 158 F.3d at 776, *with* J.A. 302-303.

Despite the recognition of the causation theory, defendants at no time asserted qualified immunity as a basis for their motion to dismiss. J.A. 291-305. On September 23, 1996, the District Court denied the motion to dismiss. S.J.A. 12. On October 11, 1996, Grant and Mason filed their Answer to the Complaint. *See* Answer. Grant and Mason cursorily referenced qualified immunity in their Answer, among others.

The parties engaged in extensive discovery and a trial date was set for April 1-4, 1997. On February 20, 1997, Grant and Mason filed a motion for summary judgment. *See* February 20, 1997 Motion for Summary Judgment of

Defendants and Memorandum in Support. In the motion for summary judgment, defendants *conceded* that the principle of effective causation by indirect means was an established legal theory, but argued they could not be liable for causing Read not to reappoint plaintiffs unless there was "evidence of fraud or duress" exercised upon Read. *See* Defendants' Mem. in Support of Motion for Summary Judgment at pp. 9-10. Again, the defendants did not mention qualified immunity.

The District Court did not rule on the motion for summary judgment and a four-day trial was held between April 1-4, 1997. After the presentation of both the plaintiffs' and defendants' evidence, the defendants moved under Rule 50 for dismissal of the case based on a factual argument that Read had made up her own mind and had not been caused by Grant and Mason not to reappoint plaintiffs. S.J.A. 1009-1011. Defendants at no time mentioned qualified immunity. The District Court granted defendants' motion under Rule 50.

Plaintiffs appealed and on October 14, 1998, the Fourth Circuit reversed the decision and remanded the case for a new trial. *See Sales I*, 158 F.3d 768. Again, the defendants did not mention qualified immunity during the appeal. In holding there was abundant evidence from which the jury could have decided Grant and Mason caused plaintiffs not to be reappointed for political reasons, the Fourth Circuit noted that the applicable law was clearly established, stating: "The governing law under which we assess the evidence here is settled and undisputed." *Id.* at 775.

Upon remand, the case was set for trial on June 1-4, 1999. In mid-April 1999, plaintiffs consented to a

substitution of defendants' counsel on the condition that there would be no continuance of the trial date. *See* April 16, 1999 Order. Instead of seeking a continuance, Grant and Mason filed on or about May 3, 1999 (less than one month before the second trial), two motions for summary judgment, contending they were entitled to qualified and Eleventh Amendment immunity. J.A. 25-26, 134-137.[4] This was the first time, after over three years of litigation, a trial, and an appeal, that these defenses had been raised with the Court, other than the passing reference to qualified immunity in defendants' initial answer.

Plaintiffs moved to quash the motions for summary judgment on the grounds they were meritless and untimely. Pet. 150-160. On May 17, 1999, the District Court agreed with plaintiffs and quashed the motions for summary judgment. Pet 49a. The Court explained it was "inappropriate for the defendants to raise the defenses of qualified immunity and Eleventh Amendment immunity at this late date." Pet. 52a. In addition, the District Court rejected the merits of defendants' qualified immunity argument, finding that the law had been "clear" and that *Sales I* did "not deviate from existing law on what level of activity constitutes causation." Pet. 52a.

In response, defendants filed a notice of appeal and a motion for stay. J.A. 314, 187. In an effort to avoid another substantial delay, having already been through a full trial and an appeal, and because plaintiffs considered the issues frivolous, plaintiffs filed a motion asking the District Court

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[4] Of course, these motions ultimately had the effect of a lengthy continuance because they allowed defendants to file an interlocutory appeal. When this appeal is over, defendants will have obtained a delay of more than two years.

to certify the appeal as frivolous and retain jurisdiction to proceed to trial. The District Court granted the motion, certified the appeal as frivolous, and retained jurisdiction. Pet. 54-55a. The District Court found, among other things, that the qualified immunity "defense giving rise to the appeal has been *waived* because it should have been raised and decided prior to the first trial in this case . . . ." Pet. 54a. (emphasis added). The Fourth Circuit determined, however, that the District Court did not have the authority to certify the appeal as frivolous and applied the automatic stay rule. J.A. 289.

Plaintiffs filed a motion to dismiss the appeal on the grounds that Grant and Mason waived their right to assert the defense of qualified immunity by failing to pursue it any time during the first trial or the first appeal. *See* Motion of the Appellees to Dismiss the Appeal. On August 16, 2000, the Fourth Circuit in *Sales II* granted the motion to dismiss and held that Mason and Grant had waived their claims of qualified immunity by failing to pursue the claim at any time prior to the remand of *Sales I*. The Court explained as follows:

> Although Mason and Grant technically pled their qualified immunity defense in their answers to the initial complaint, they *never* explained the legal or factual basis for their claim of qualified immunity prior to remand after *Sales I*. Indeed their mention of qualified immunity in their answers consisted of only a single, cursory sentence on the matter, contained in a listing of several affirmative defenses . . . .

> And, . . ., although the defendants had numerous opportunities prior to remand to assert their claim of qualified immunity, they failed to do so. Specifically, Mason and Grant omitted any mention of qualified immunity from their pre-trial motions to dismiss and for summary judgment, from the presentation of their case during a four-day trial, and from their post-trial motion for dismissal. As such, prior to remand after *Sales I*, the notion that qualified immunity might play a role in Mason and Grant's defense was mentioned to the district court only once, and even on that occasion [in the answer], the defendants failed to provide any explanation as to how or why qualified immunity might apply. Under these circumstances, we have no trouble concluding that the defendants waived their right to press seriously their claim of qualified immunity for the first time after remand.

Sales II, 224 F.3d at 296 (emphasis added).

The defendants filed a petition for rehearing and rehearing *en banc* which was denied by the Fourth Circuit. A new trial date has been scheduled in the Western District of Virginia, to commence on July 9, 2001.

REASONS FOR DENYING THE WRIT

I. There Is Nothing Unusual About The Decision of the Fourth Circuit In *Sales II*, Which Is Fully In Accord With Established Precedent, The Interests Of Justice, And The Enhancement Of Judicial Economy.

A. Qualified Immunity Is Waivable.

The Fourth Circuit's decision in *Sales II* is fully in accord with substantial precedent from this Court, the Fourth Circuit, and numerous other Circuit Courts of Appeals which recognize that qualified immunity is a waivable defense. As this Court has held, "qualified immunity questions should be resolved at the earliest possible stage of litigation." *Anderson v. Creighton*, 483 U.S. 635, 642, n. 6 (1987). This is true for several reasons, including that there is a right of interlocutory appeal and the parties should not be made to go through the expense and effort of a trial if the issue will resolve the case at an early stage. Moreover, there is great potential for strategic delays caused by raising the defense at a late date and then pursuing an interlocutory appeal. *See Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664, 667 (1st Cir. 1996) ("In order to reduce the potential for abuse by defendants, we believe that the defense of qualified immunity may be deemed to have been waived if it is not raised in a diligent manner during the post-discovery, pre-trial phase. To find otherwise is to invite strategic use of the defense by defendants who stand to benefit from delay.").

A defendant who fails to pursue a qualified immunity defense in a timely manner has waived that defense. In *Suarez Corp. Industries v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997), the Fourth Circuit acknowledged the general rule that the defense of qualified immunity would be waived and could not be raised at a later stage if it "was not squarely

before the district court" in the initial trial court proceedings. Although the defendants in *Suarez* claimed the defense was alluded to in a memorandum filed with the district court, the defense was not developed or preserved in any meaningful sense and therefore was waived. *Id.*, citing *Buffington v. Baltimore*, 913 F.2d 113, 120-22 (4th Cir. 1990) (holding that a Court would not "consider *sua sponte* a defense of qualified immunity in a § 1983 action when it was not properly preserved below"). In holding that qualified immunity could be waived, the Fourth Circuit noted in *Suarez* that "other circuits [were] in agreement." *Suarez*, 125 F.3d at 226, citing with approval *Caban-Wheeler v. Elsea*, 71 F.3d 837, 842 (11th Cir. 1996) (rejecting summarily the defendant's assertion of qualified immunity to a § 1983 claim because it was not raised in the District Court); and *Berryman v. Regiler*, 47 F.3d 1167, 1995 WL 31575, at *4 (6th Cir. 1995) (unpublished) (refusing to consider a defense of qualified immunity in a § 1983 action when the defense was not raised).

B. A Mere Reference To Qualified Immunity In An Answer Does Not Allow A Defendant To Delay Unreasonably In Pursuing The Defense.

It is also well established that merely mentioning the defense of qualified immunity in an answer is not sufficient to preserve the defense for all time. A party may not unreasonably delay pursuing the defense or it will be waived. *See Blissett v. Coughlin*, 66 F.3d 531, 538-39 (2d Cir. 1995) (the defense of qualified immunity was waived and defendants could not raise it on the morning of trial where although the defendants referenced immunity in their answer, they failed to "adequately develop a qualified immunity defense during [five years of] pretrial proceedings," they made no mention of the defense in

pretrial memoranda of law, and they had offered no jury instructions on the issue); *Lord-Butcher v. City of Newport Beach*, 79 F.3d 1153, 1996 WL 111588 (9th Cir. 1996) (unpublished) (defendants waived qualified immunity by not including the defense in the pretrial order and waiting until after the close of evidence to raise the issue); *Buenrostro v. Collazo*, 973 F.2d 39, 44 (1st Cir. 1992) (Where the defendants asserted one theory of qualified immunity, they could not later "switch horses" and assert another theory of qualified immunity on appeal: "[q]ualified immunity is, after all, an affirmative defense, and the 'right' to have it determined in an intermediate appeal can be waived if it is not properly asserted below."); *Maul v. Constan*, 928 F.2d 784, 785 (7th Cir. 1991) (although defendant may have technically pled qualified immunity as a defense, the defense was waived when he "did not press [the defense] in any pretrial motions, at the pretrial conference, or at trial").

The case of *Walsh v. Mellas*, 837 F.2d 789 (7th Cir. 1988), which plaintiffs have cited repeatedly, but which is conspicuously missing from the Petition, is squarely on point. *Walsh* held that a qualified immunity defense was waived and could not be pursued in a new trial after remand where the defendant had failed to pursue the defense during the first trial. In so holding, the Court relied on principles of judicial economy and efficiency which require that the defense of qualified immunity be brought to the attention of the trial court at the earliest possible time. *Id.* at 799-800, n.7. To allow a defendant to raise qualified immunity for the first time on appeal or on remand would be to condone piecemeal litigation, which is antithetical to the interests of the judicial system and public policy.

In *Walsh*, the defendants asserted qualified immunity as an affirmative defense in their answer, but never pursued

the issue again until after a first trial (in which the defendants had prevailed) and a reversal and remand by the Seventh Circuit. *Id.* at 800. On remand for a second trial, the defendants for the first time attempted to pursue an immunity defense, but the Court held that the defense had been waived. *Id.* The reasoning of the Seventh Circuit was supported by substantial authority and is remarkably pertinent here:

> As with other affirmative defenses upon which the defendants bear the burden of proof . . ., the defense of qualified immunity may be deemed waived if not properly and timely presented before the district court. In *Walsh I,* the defendants 'raised' the defense in their answer, but failed to bring the argument to the court's attention, despite their having numerous opportunities to do so. The cases holding that an omission of this character constitutes a waiver of the right to present that issue on appeal are legion . . . . 'A trial judge may properly depend upon counsel to apprise him of the issues for decision. He is not obligated to conduct a search for issues which may lurk in the pleadings.' . . . It is clear from our review of the district court proceedings in *Walsh I,* that defendants abandoned the defense.

Id. at 799-800 (citations omitted) (emphasis added).

The Court explained further that the defendants' failure to raise the issue of qualified immunity in the first appeal also precluded them from asserting the defense on

remand. *Id.* at 800. Again, the striking similarity of *Walsh* to the present case is apparent:

> Additionally, the qualified immunity defense was not raised on appeal in support of the district court's holding in *Walsh I*. Defendants contend that the failure to press the issue on appeal is excusable since they were at the time defending a district court decision that did not address the issue of qualified immunity. True, the district court did not address the issue, for the parties failed to raise their possible immunity at trial. Defendants' excuse—that they did not raise the issue in the *Walsh I* appeal because the district court did not decide the case on that ground – does not cure the initial problem for had they lost in the district court, they still would have been precluded from advancing the qualified immunity defense on appeal because of their failure to raise the issue in the trial court. *Once district court proceedings conclude and defendant fails to raise an affirmative defense, the defendant simply forfeits his or her right to assert that defense on appeal . . . Consequently, defendants' assertion of the defense of qualified immunity on remand from Walsh I, . . ., and in this second appeal, comes too late.*

Id. (emphasis added) (citations omitted).

The present case is indistinguishable from the numerous authorities cited above. Grant and Mason pled qualified immunity as an affirmative defense and had every opportunity to pursue it during *Sales I*. At no time did Grant or Mason argue or even mention qualified immunity as a

basis for judgment in their favor. Instead, petitioners themselves submitted a proposed jury instruction and a Special Verdict Form which adopted without equivocation the well-established principle that they could be liable as the effective cause of plaintiffs' constitutional injuries, the very theory defendants now disingenuously contend was not clearly established.[5] Accordingly, neither the District Court in the first trial nor the Fourth Circuit on appeal in *Sales I* had the opportunity to address the issue and to prevent exactly what has now happened – *inexcusable delay and piecemeal litigation.*

In short, the Fourth Circuit was well within the bounds of settled law when it held that Grant and Mason waived their right to assert the defense of qualified immunity. *See Powell v. Nevada*, 511 U.S. 79, 87 (1994) (Thomas, J., dissenting) ("We make poor use of judicial resources when, as here, we take a case merely to reaffirm . . . settled law."). If Grant and Mason truly believed they had a legitimate qualified immunity defense, they should have raised it in the first trial. Their failure to do so has already unnecessarily and substantially increased the expense of the parties and burdened the judicial system. Petitioners should not be allowed to use the defense of qualified immunity to strategically delay a case beyond reason and to wage a war of attrition. Instead, as the Fourth

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[5] See Affidavit of David E. Constine, III, which was attached as Exhibit B to the Motion to Dismiss, and which attaches the pertinent instruction and Special Verdict Form. Petitioners' own proposed instruction conceded that Grant and Mason could be liable for causing Read not to reappoint plaintiffs if the jury found 1) they "actually exerted such influence over Ms. Read's hiring decision and that [plaintiffs'] political party affiliation … was a substantial or motivating factor for Grant or Mason to seek to influence Carol Read's hiring decision," and 2) that Read's decision not to reappoint plaintiffs "was in fact influenced by Grant or Mason …."

Circuit found in *Sales II*, the defense was clearly waived and the Petition should be denied.

C. *Sales II* Does Not Conflict With Any Authority From This Court, The Fourth Circuit, Or Other Circuit Courts of Appeal.

In a transparent attempt to present a basis for this Court's review, petitioners cavalierly assert that *Sales II* is in conflict with precedent from other Circuits. The truth is otherwise, as is confirmed from a review of the cases cited by petitioners. Indeed, plaintiffs are aware of no cases, and petitioners cite none, holding that qualified immunity is *not* waivable or that qualified immunity may be raised on remand when it was simply referenced in an answer and never argued or developed at any time before remand.

Sales II is not contrary to Fourth Circuit precedent, as the Fourth Circuit explained it had never addressed the waiver of qualified immunity "under the exact circumstances present here." As explained above, however, *Suarez* articulated the general rule that qualified immunity can be waived when it is not properly raised in the district court, which is also the holding in *Sales II*. *Suarez* and *Sales II* are also consistent with precedent from the Fourth Circuit holding that the failure to press qualified immunity as a defense during the course of litigation can constitute waiver of the defense. *See, e.g., Brooks v. Davis*, 1998 U.S.App. LEXIS 7968 (4th Cir. 1998) (unpublished) (finding that defendants waived their right to assert qualified immunity after trial, notwithstanding that they had asserted the defense in their answer, but not at any other stage, explaining that to "the extent that defendants challenge the district court's denial of summary judgment based on their claim of qualified immunity, raised only in their answer, they waived this claim by failing to raise it in their motion for summary

judgment or their objections to the magistrate judge's report."); *Wilkes v. Young*, 28 F.3d 1362 , 1377, n.12 (4th Cir. 1994) (Phillips, J., dissenting) (recognizing that qualified immunity could be waived, citing *Walsh* and other authorities, and finding that defendant had waived the defense by failing to develop and pursue it, notwithstanding that the defense had been initially pled in the answer, explaining "[t]hough Young pleaded . . . qualified immunity in his answer, he did not assert it . . . prior to his trial, ask that it be submitted to the jury, urge it as a ground for overturning the verdict in his post-verdict JNOV motion, or otherwise press it in the trial court . . . .")

In support of their alleged "conflict," petitioners place great reliance on the cases of *Santos v. District Council of New York*, 619 F.2d 963, 967 (2d Cir. 1980) and *Kultzer v. — Pittsburgh-Corning Corp*, 942 F.2d 122, 125 (2d Cir. 1991). These cases, however, have nothing to do with the issue of qualified immunity. They simply hold that a defendant who *generally* pleads a statute of limitations defense need not do so with specificity and that a statute of limitations defense is "sufficiently raised for purposes of Rule 8 by its bare assertion" in an answer. *Santos*, 619 F.2d at 967. In both *Santos* and *Kultzer*, the defendants generally raised statute of limitations defenses in their answers and then pursued specific defenses at trial. Not surprisingly, the courts held this was permissible under the notice pleading requirements of Rule 8. Neither case addressed or mentioned qualified immunity.

Petitioners also rely on *Daingerfield Island Protective Service Co. v. Babbitt*, 40 F.3d 442, 445 (D.C. Cir. 1994). Again, *Daingerfield* has nothing to do with qualified immunity. Instead, the issue was whether defendants had waived a statute of limitations defense by not

raising the issue until after a remand. Although the Court found no waiver of that defense, *Daingerfield* did not involve a defense which could be appealed on an interlocutory basis, such as qualified immunity. Unlike the denial of a statute limitations defense, a denial of qualified immunity can be immediately appealed, thereby wreaking havoc with the trial schedule and causing substantial delays. Accordingly, the potential for abuse is obvious and real. Waiver may be the only shield a plaintiff has against a defendant who, as in this case, uses qualified immunity as a sword for purposes of delay. A finding of waiver in the qualified immunity context is consistent with the admonition of the Supreme Court that defendants must raise the issue "at the earliest possible stage of litigation." *Anderson*, 483 U.S. at 642, n.6.

In sum, petitioners have cited no case which conflicts with the decision in *Sales II*. There is no dispute that qualified immunity is waivable; and the unforgivable delay caused in this case by the defendants' failure to pursue the defense at any time prior to remand precludes them from pursuing it now. To hold otherwise would encourage defendants to engage in a strategy of delay by waiting until the last possible moment to raise the defense, knowing they could safely assert it without waiver and then file an interlocutory appeal if it was denied. This type of conduct is a pox on the system and should not be encouraged or condoned.[6]

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[6] In light of the egregious circumstances under which petitioners have belatedly raised their qualified immunity defense (i.e., after a full trial and appeal and a mere month before the second trial of this matter), their claim that "there is no showing that the petitioners had pursued a strategy of delay which has prejudiced the respondents" rings hollow. Pet. Brief, at 15. Indeed, petitioners' have tirelessly pursued for two years a

- footnote continued -

II. The Excuses Offered By Petitioners For Their Delay In Pursuing Qualified Immunity Are Baseless.

A. *Sales I* Did Not Change The Law Or Create New Law.

In the face of the substantial authorities demonstrating the correctness of the *Sales II* decision, petitioners attempt to distract this Court by focusing on the holding in *Sales I*.[7] Specifically, petitioners claim that *Sales I* "changed" and "expanded" the law and that this "change" somehow justified their more than three-year delay in pursuing a qualified immunity defense. Pet. Brief at 2, 4, 6-8.

Sales I did not change the law whatsoever. Instead, the governing law was clearly established at the time that Mason and Grant, for partisan reasons, intentionally caused respondents not to be reappointed as Assistant Registrars. Specifically, the law was clear: (1) that Assistant Registrars were protected by the First and Fourteenth Amendments from adverse employment actions based on their political affiliations; and (2) that persons acting under color of state law, such as Mason and Grant, could not, either directly or indirectly, cause the deprivation of another individual's constitutional rights. *See McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987); *Sales I*, 158 F.3d at 775-76 (and the numerous cases cited therein); 42 U.S.C. § 1983.

The law has been clearly established for 130 years since the enactment of Section 1983 that a person acting

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substantively frivolous qualified immunity defense for precisely that purpose.

[7] Indeed, petitioners' entire "change in the law" argument is really nothing more than an attack on the merits of the holding in *Sales I*. Besides the fact that *Sales I* is absolutely correct, the time for any attack on that decision has passed.

under color of state law may be liable for effectively causing a constitutional deprivation, regardless whether that deprivation was caused by direct or indirect means. This well settled principle of law is derived from the literal language of Section 1983 and ample precedent from this Court, the Fourth Circuit, and every other court that has considered the issue. *See Sales I*, 158 F.3d at 775-76 (and the numerous cases cited therein). Section 1983 provides that a person who, "under color of [state law] subjects, or *causes to be subjected*, any [person] to the deprivation of any rights . . . secured by the Constitution . . ., shall be liable to the party injured. . . ." (emphasis added). This language simply articulates the principle of proximate cause, which is part and parcel of every Section 1983 case. *See Malley v. Briggs*, 475 U.S. 335, 344, n.7 (1986) (where this Court, quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961), held that § 1983 liability is imposed based on principles from "tort liability that make[] a man responsible for the natural consequences of his actions.").

In *Sales I*, the Fourth Circuit cited numerous authorities from this Court and other Circuits which demonstrated that the law governing the conduct of Grant and Mason was clearly established. *Sales I*, 158 F.3d at 775-76. Petitioners claim that *Sales I* was a "change" in the law because it was the first time the Fourth Circuit had ever applied the proximate cause concept of effective causation by indirect means in the context of an *Elrod-Rutan* case. Pet. Brief at 7. This argument is not only without logic, it is wrong as a factual matter. *See, e.g., Coston v. Hooper*, 885 F.2d 864, 1989 WL 106994 (4th Cir. 1989) (unpublished) (where the Court properly applied indirect causation principles to uphold liability against two individuals who, while not having the direct authority to do so, effectively caused the termination of a state employee because he

refused to fire employees who were affiliated with the Democratic party). *See also Conner v. Reinhard,* 847 F.2d 384, 396-97 (7th Cir. 1988) (city alderman who recommended the firing of city employee, even though he had no direct firing authority, could be liable under Section 1983 because ". . . direct participation by a defendant is not necessary . . . . The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should of known would cause others to deprive plaintiff of her constitutional rights").

Indeed, petitioners' suggestion that political affiliation discrimination cases are somehow exempt from basic proximate cause concepts such as effective causation through indirect means is simply ridiculous. Political affiliation discrimination cases are no different than any other Section 1983 cases with respect to principles of causation. As is clear from the authorities cited above, general tort principles, including basic principles of proximate cause, govern the *entire* body of Section 1983 jurisprudence, without exception to any category. Those principles, as applied in the Fourth Circuit and elsewhere, plainly permit a plaintiff to establish liability under Section 1983 through both direct and *indirect* means. Not surprisingly, petitioners have cited no case which adopts their position or even suggests it is correct.

Simply put, there is nothing unusual about the Fourth Circuit's application of effective causation principles in *Sales I.* Accordingly, there is no doubt that had petitioners raised a qualified immunity defense in a timely fashion (which they did not), such a defense would have been hopelessly futile.

B. Petitioners Have At All Times Known That Plaintiffs Were Relying Upon A Theory Of Effective Causation To Hold Them Liable For Their Unlawful Actions.

Petitioners claim they never raised qualified immunity because they did not know prior to *Sales I* that they could be found liable under a theory of effective causation by indirect means. This argument is completely contradicted by the record of this case and can only be regarded as disingenuous.

There is no dispute that plaintiffs' theory of the case is the same today as the day the case was filed almost six years ago. The Complaint expressly alleges that Grant and Mason, through their influence and control over Read, caused her to not reappoint plaintiffs as the Assistant Registrars. J.A. 22-23. Petitioners therefore were fully aware that plaintiffs were accusing them of being the effective cause of their non-reappointment, as evidenced by the defenses petitioners asserted in their motions to dismiss and for summary judgment. In each of these motions, petitioners argued they could not be the "*proximate cause*" of plaintiffs' constitutional deprivations because Carol Read was the appointing authority. J.A. 302. In support of their motion to dismiss in 1996, petitioners even cited and attempted to distinguish the seminal cases from this Court applying the well established theory of effective causation by indirect means, such as *Malley v. Briggs*, 475 U.S. 335 (1986). J.A. 302-03. Petitioners obviously knew plaintiffs were attempting to hold *them* liable for causing Read not to reappoint plaintiffs because plaintiffs have made no attempt in this case to hold *Read liable*. For petitioners now to try and assert they were unaware of plaintiffs' legal theory until after *Sales I* was decided is nothing short of specious.

C. Petitioners' Argument Concerning A Change In "Legally Relevant Factors" Is A Concoction That Has No Support In The Law.

Without any meaningful explanation, petitioners contend that *Sales I*, by "changing" the law, "radically altered" the "legally relevant factors" involved in a determination of qualified immunity and the Fourth Circuit somehow erred by failing to inquire into this alleged radical alteration of these "factors." Pet. Brief at 6-8. Petitioners have never made this argument at any other stage of the proceedings, and it is such a strained and disjoined concoction that it barely warrants rebuttal.

As an initial matter, there has been no change in any "legally relevant factors" in this case. The theory of effective causation through indirect means, which petitioners challenge as groundbreaking law: (1) has been the essence of plaintiff's case since the day it was filed; (2) is simply a proximate cause principle; and (3) has been a clearly established part of Section 1983 jurisprudence since the statute was enacted.

Moreover, the concept of "legally relevant factors," which petitioners make no attempt to explain, has nothing to do with this case. The "legally relevant factors" phrase is simply descriptive terminology that petitioners have pulled out of context from *Behrens v. Pellitier*, 516 U.S. 299 (1996), a case where the issue of waiver was never addressed or mentioned. In *Behrens*, the Court addressed whether a defendant could file successive interlocutory appeals after the district court denied qualified immunity on a motion to dismiss, and then again after a denial of summary judgment. In this context, the Court used the phrase "legally relevant factors" in reference only to the difference between raising a qualified immunity defense on a motion to dismiss and on a

motion for summary judgment. The Court explained as follows:

> [R]esolution of [qualified immunity] may 'require more than one judiciously timed appeal,' because the *legally relevant factors* bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss. At that earlier stage, it is the defendants' conduct, *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.' On summary judgment, however, the plaintiff can no longer rest on the pleadings . . . and the court looks to evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry.

Id. at 309. (emphasis added). Thus, the concept of "legally relevant factors" has no applicability to the issue of waiver presented in this case where qualified immunity has been raised only once and there is no issue as to the propriety of successive interlocutory appeals because only one such appeal has been made.

D. Petitioners Cannot Hide Behind The First Amendment To Support Their Claim Of Qualified Immunity.

In a further effort to avoid liability, petitioners attempt to wrap themselves in the First Amendment, sounding the false alarm that the Fourth Circuit has denied them "important First Amendment rights." Pet. Brief at 9. In doing so, petitioners make two arguments: (1) that *Sales I*, which held they could be liable for their conduct, denied petitioners their First Amendment rights to engage in "core

public or partisan speech," such as speaking out "strongly about public matters, even in a partisan way," *See* Pet. Brief at 10-11; and (2) that qualified immunity is available where there is a balancing of competing First Amendment interests, *see* Pet. Brief at 10-11. Again, petitioners are still attacking *Sales I*, which opportunity passed long ago, and their arguments, in any event, have no support in law and must be rejected.

1. The First Amendment Does Not Protect A Government Official Who Is Engaged In Discrimination.

The petitioners have not been denied any of their First Amendment rights. Petitioners completely disregard the evidence discussed in *Sales I*, and the inferences drawn therefrom, and try to portray themselves as public officials who were innocently doing nothing more than voicing recommendations and providing input. Petitioners' argument presents a question of fact which has nothing to do with qualified immunity and is contradicted by the evidence in this record. Indeed, the record evidence discussed in *Sales I* amply supports a finding that Mason and Grant were far from innocent and instead were "substantially, if not entirely, motivated by political considerations" to engage in discriminatory *conduct*. *Sales I*, 158 F.3d at 780.

Whether petitioners actually discriminated or whether they were innocently exercising their First Amend rights is a question of fact that has nothing to do with qualified immunity or the waiver thereof. If a jury determines that petitioners were motivated by politics to cause the non-reappointment of plaintiffs, then petitioners are liable because the First Amendment does not protect a government official engaged in discrimination. *See, e.g., Baty v. Willamette Industries, Inc.*, 172 F.3d 1232 (10th Cir. 1999)

(imposing liability on employer for failing to regulate its employee's harassing speech under Title VII does not violate the First Amendment because the "speech in question amounts to discriminatory conduct, not just speech"); *Vililaneuva v. Wellesley College*, 930 F.2d 124, 129 (1st Cir. 1991) (academic freedom [under First Amendment] does not embrace the freedom to discriminate); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 360 (1st Cir. 1989) (First Amendment protection "does not include the freedom to discriminate . . . on the basis of sex or other impermissible grounds").

2. No Balancing Test Was Required To Determine Whether *Plaintiffs* Had A First Amendment Right To Be Free From Political Affiliation Discrimination.

Petitioners also cannot claim that they are entitled to qualified immunity because they had to engage in a "balancing test" to assess whether plaintiffs had a right to be free from political affiliation discrimination. Plaintiffs' right to be free from political affiliation discrimination was clearly established in *McConnell v. Adams*, which obviates any need for a balancing test. Nonetheless, petitioners suggest there are competing interests in this case, i.e. petitioners' First Amendment rights in free speech vs. plaintiff's First Amendment right to be free from political affiliation discrimination, and therefore they are entitled to qualified immunity.

Petitioners' argument fails because no balancing test is required when a plaintiff, such as in this case, had a clearly established and absolute right to be free from political affiliation discrimination. Petitioners argue they are entitled to qualified immunity because their alleged First Amendment right to free speech, which in this case was

discriminatory speech and conduct, must be balanced against plaintiffs' First Amendment right to be free from discrimination and, as a result, defendants are entitled to qualified immunity. This is not the law and petitioners cite no case to support such an argument. If this test were adopted, any government official who engages in discrimination and causes a plaintiff to be subjected to an adverse employment decision could claim immunity on the simple grounds that he (the defendant) was exercising his right of free speech. Any such holding would substantially eviscerate the protections afforded by Section 1983.

CONCLUSION

The Fourth Circuit's decision in *Sales II* was correct and straightforward; the issues presented are neither novel nor difficult; and petitioners' challenges to both *Sales II* and *Sales I* are strained and meritless. The Petition for Writ of Certiorari should be denied and the case should be allowed to proceed to trial on July 9, 2001, as scheduled.

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